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IN THE

Supreme Court of the United States

OCTOBER TERM—1938

No. ~~701~~ 9

STANDARD BRANDS INCORPORATED,
Petitioner,

vs.

NATIONAL GRAIN YEAST CORPORATION,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

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I. Patent 1,449,103 has been held valid by the Circuit Court of Appeals for the Fourth Circuit, and the Federal Yeast Corporation of Baltimore is under injunction which prohibits infringement. The patent has been held invalid by the Circuit Court of Appeals for the Third Circuit and respondent is thus permitted to do what the Federal Yeast Corporation is enjoined from doing.

Examination of the conflicting decisions in the two cases shows squarely opposing judicial conclusions, which constitute "a real and embarrassing conflict" whether considered from the business viewpoint of the large industry involved or from the public viewpoint of respect for orderly judicial process.

No case is cited by respondent or known to petitioner where certiorari has been denied in such a situation. In the case of *Layne & Bowler Corporation* v. *Western Well Works Inc. et al.* (261 U. S. 387) cited by respondent, there was no such conflict and the case is not in point.

Respondent's suggestion that the writ of certiorari should be limited to the question of validity and exclude the question of infringement is a mere plea for dilatory and piecemeal consideration. On the question of infringement there is also judicial conflict between the District Court in New Jersey (21 F. Supp. 46-47) and the District Court in Maryland (38 F. (2d) 329, 350-351). If the patent is to be reviewed by this Court, then this Court's final judgment should settle both the issues of validity and infringement, which are directly involved.

II. As to the -105 and -106 patents held invalid below and held valid by the District Court of Maryland, we point out the following.

The reality of judicial conflict appears incontrovertibly from reading the divergent opinions. To avoid review by this Court, respondent accordingly relies on the argument that the Baltimore litigation ended by settlement after the decision of the District Court whereas the decision below herein is that of a Circuit Court of Appeals.

The Baltimore settlement, however, included the payment of a large sum by defendant as damages, and the settlement was at the instance of defendant not of plaintiff. Accordingly, it is believed that the denial, on the above ground, of the writ as to patents -105 and -106 would amount to a tacit expression by this Court of a rule constituting an effective deterrent to settlement of litigation by a plaintiff successful in the trial court in a patent case. These patents now stand finally adjudicated valid in Maryland, where the Federal Yeast Corporation is under injunction also as to them, and invalid in New Jersey. The disparity is not conducive to the interests of the several parties nor of the public, and should be corrected in the only manner possible, namely, by review by this Court.

III. Pages 5 to 12 of respondent's brief, which are devoted to argument on the merits of the patents in suit should be disregarded because such argument is not deemed in order on the initial questions of whether there is conflict of opinion and whether the writ should be granted. It is not understood that full briefs on the issues of validity and infringement of patents are called for on petitions for writ of certiorari in cases where conflict of decision is present. Respondent's argument should also be disregarded, because petitioner flatly denies the truth of many of the statements of alleged fact therein.

IV. We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

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CLAIR V. JOHNSON
CHARLES P. BAUER.

March 17, 1939.